CAMBRIDGE MINING CO.

IBLA 81-976 Decided June 24, 1983

Appeal from a decision of the Colorado State Office, Bureau of Land Management, requiring an increase in bond for coal lease C-078049.

Affirmed as modified and remanded.

1. Administrative Procedure: Administrative Procedure Act -- Administrative Procedure: Rulemaking -- Coal Leases and Permits: Royalties

   Guidelines issued by Geological Survey, dated Apr. 23, 1980, fixing the amount of a coal lease bond at three times monthly production, are not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1976).

2. Coal Leases and Permits: Royalties

   Guidelines fixing the amount of a coal lease bond at three times monthly production are not arbitrary and capricious by reason of the fact that the rationale for the guidelines is not set forth therein.

APPEARANCES: Richard L. Fanyo, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Cambridge Mining Co. (Cambridge) appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated June 29, 1981, requiring appellant to increase its existing bond on coal lease C-078049. BLM determined that the bond amount be increased from the present $5,000 to $25,000, this latter figure representing royalty for 5 months for producers paying royalties quarterly. In the alternative, BLM granted appellant the option of paying royalties monthly, in which event a bond in the amount of $17,000 would be required. This $17,000 figure, BLM states, represents three times the average monthly royalty payment.

Cambridge objects to the establishment of the bond in either amount, arguing that both are excessive, arbitrary, unauthorized, and fail to consider its record of timely royalty payments. In addition, Cambridge states that its monthly royalty in the second quarter of 1981 averaged $2,019. Projected monthly royalty is $2,100.

By order of June 3, 1982, this Board requested information from BLM that would explain how it had arrived at its decision. On April 15, 1983, BLM responded. 1/ A copy of this response was sent to appellant.

In its response, BLM stated that the average monthly royalty paid by Cambridge for calendar year 1980 was $4,636.70. This amount was used by BLM in calculating the amount of Cambridge's bond pursuant to guidelines formulated by Geological Survey. These guidelines, dated April 23, 1980, are in the form of a memorandum from the Deputy Division Chief, Onshore Minerals Regulation, to the Conservation Managers of various regions. The guidelines state in relevant part:

> Please advise the Mining Supervisors that the following guidelines are effective immediately:
>
> 1. For royalty payments made monthly in the month following the monthly production or sales, the amount of bond shall be sufficient to cover 3 months of estimated production.
>
> 2. If royalty payments are made on a quarterly basis, the amount of bond shall be sufficient to cover 5 months of estimated production.
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> * * * * * * *
>
> 6. The adequacy of the bond should be reviewed annually and adjusted where necessary.
>
> In addition to production royalty, the bond should cover 1 year's rental and any other bond required for exploration or other Mineral Leasing Act requirements.
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> * * * * * * *
>
> Any lessee who is not paying royalty on a monthly basis may, at his option, elect to pay royalty on a monthly basis in order to reduce the amount of bond required.

1/ Cambridge moves to dismiss BLM's response as delinquent because of the considerable delay between order and response. We deny this motion. This delay, apparently caused by BLM's misplacement of our order, caused no prejudice to appellant. In the absence of harm to appellant or a regulation on point, BLM's delay does not support a motion to dismiss.

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These guidelines supersede the bonding guidelines established in the memorandum of the Chief, Conservation Division, dated June 20, 1977.

[1] Cambridge argues that these guidelines constitute a rule under 5 U.S.C. § 551(4) (1976) and that such guidelines were not promulgated in accordance with 5 U.S.C. § 553 (1976). The first of these citations to the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." Section 553 requires an agency to give notice to the public of proposed rulemaking and an opportunity to participate in the rulemaking by submission of written data, views, or arguments.

Cambridge points out that although the requirement of notice to the public of proposed rulemaking does not apply to interpretive rules or general statements of policy, Survey's guidelines fit in neither of these categories. Counsel argues that these categories do not apply because the guidelines leave no room for the exercise of discretion by administrators establishing bond amounts and are intended to implement the legislative authority delegated to the Secretary under the Mineral Leasing Act of 1920, as amended, with the force and effect of law. No citations to case law or further materials are offered in support of these arguments.

Section 553(b)(A) provides that the requirement of notice to the public of proposed rulemaking does not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. Interpretive rules are not defined in the APA, but their meaning is distinguishable from that of a "substantive" or "legislative" rule. A substantive or legislative rule has the force of law; an interpretive rule is merely a clarification or explanation of an existing statute or rule. Guardian Federal S & L v. Federal S & L Insurance Corp., 589 F.2d 658, 664 (D.C. Cir. 1978). Legislative rules are those that are promulgated pursuant to a congressional delegation of power to issue rules and regulations that have the force of law. American Trucking Association v. United States, 688 F.2d 1337 (11th Cir. 1982). A general statement of policy within the meaning of 5 U.S.C. § 553(b)(A) does not establish a binding norm; rather it leaves the administrator free to exercise his informed discretion in the situations that arise. Guardian Federal S & L v. Federal S & L Insurance Corp., supra at 666.

Regulation 43 CFR 3474.2 provides that a coal lease bond, 2/ conditioned upon compliance with all terms and conditions of the lease, shall be furnished

2/ The preamble to Subpart 3474, found at 44 FR 42607 (July 19, 1979), states that a lease bond assures payment of all rentals and royalties, and covers potential damage to surface resources and values on a lease prior to issuance of a surface mining permit, and outside a permit area on a lease. Such bond will not duplicate the reclamation performance bond.

in an amount determined by the authorized officer. The guidelines at issue state what this amount shall be. Although they do not set forth dollar amounts, the guidelines do clarify a regulation that has been written intentionally vague as to the amount of bond. As such, the guidelines may be regarded as interpretive rules. So classified, the guidelines were not subject to the notice and comment provisions of section 553. Our holding herein makes unnecessary a discussion whether such guidelines were also general statements of policy and, pursuant to section 553(b)(A), were similarly relieved of the notice and comment provisions of section 553. We point out that similar guidelines, set forth as instruction memoranda, have been disregarded by this Board when found to be contrary to established Department policy. Milton D. Feinberg, 37 IBLA 39, 44 (1978).

Cambridge also maintains that the guidelines are arbitrary and capricious because Survey's rationale for establishing the size of the bonds does not appear in the guidelines themselves. No citation is offered for this argument. Cambridge concedes that one could think of reasons for using the bond levels employed by Survey (three times monthly estimated production, etc.) but argues that equally valid reasons could be produced for using other levels. It further argues that the guidelines are arbitrary and capricious because they do not allow sufficient discretion to consider Cambridge's history of royalty payments. Had BLM considered Cambridge's royalty payments for the year commencing July 1, 1980, lower bond amounts would have resulted, Cambridge maintains. 3/

[2] The arguments of Cambridge, while possibly useful to BLM in the event it revises the guidelines, do not establish error in BLM's use of the guidelines. Instead, Cambridge offers alternate ways of setting bonding amounts. Given, however, the considerable lapse of time between BLM's decision and the decision of this Board, a bond based on 1980 royalty payments is unlikely to reflect current production levels. Data presented on appeal by Cambridge shows royalty payments for the first half of 1981 considerably lower than for the corresponding period in 1980. Cambridge also notes that its mine plan called for production levels in the last half of 1981 and in 1982 similar to its production for the first half of 1981.

During the pendency of this appeal, Cambridge has presumably been operating under a $5,000 bond. A decision holding said amount to be insufficient will have no retroactive effect and serve no useful purpose. On remand, BLM should consider Cambridge's most recent royalty payments in setting a new bond amount. Its use of the guidelines discussed earlier would not be improper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the

3/ Our holdings herein are based on the facts as Cambridge has presented them. No need for a factual hearing appears from the record. Appellant's request for a factual hearing is, accordingly, denied.

State Office is affirmed as modified, and the case file is remanded for action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge